VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 709

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, PETITIONER,

vs.

MARY L. DONNELLY HENAGAN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 15, 1960
CERTIORARI GRANTED MAY 2, 1960

Volume II

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[fol. 137a]

IN UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5511

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant, Appellant,

v.

MARY L. DONNELLY HENAGAN, Plaintiff, Appellee.

Record Appendix to Brief for Defendant, Appellant

Exhibits.

If the exhibits had been inserted in serial order they would have been in awkward positions for examination (particularly Exhibits 1 and 1A, which are folded).

For grgater convenience of the court the exhibits have been bound in the following order:

Plaintiff's Exhibit 2A.

Plaintiff's Exhibit 2B.

Plaintiff's Exhibit 2C.

Plaintiff's Exhibit 2D.

Plaintiff's Exhibit 2E.

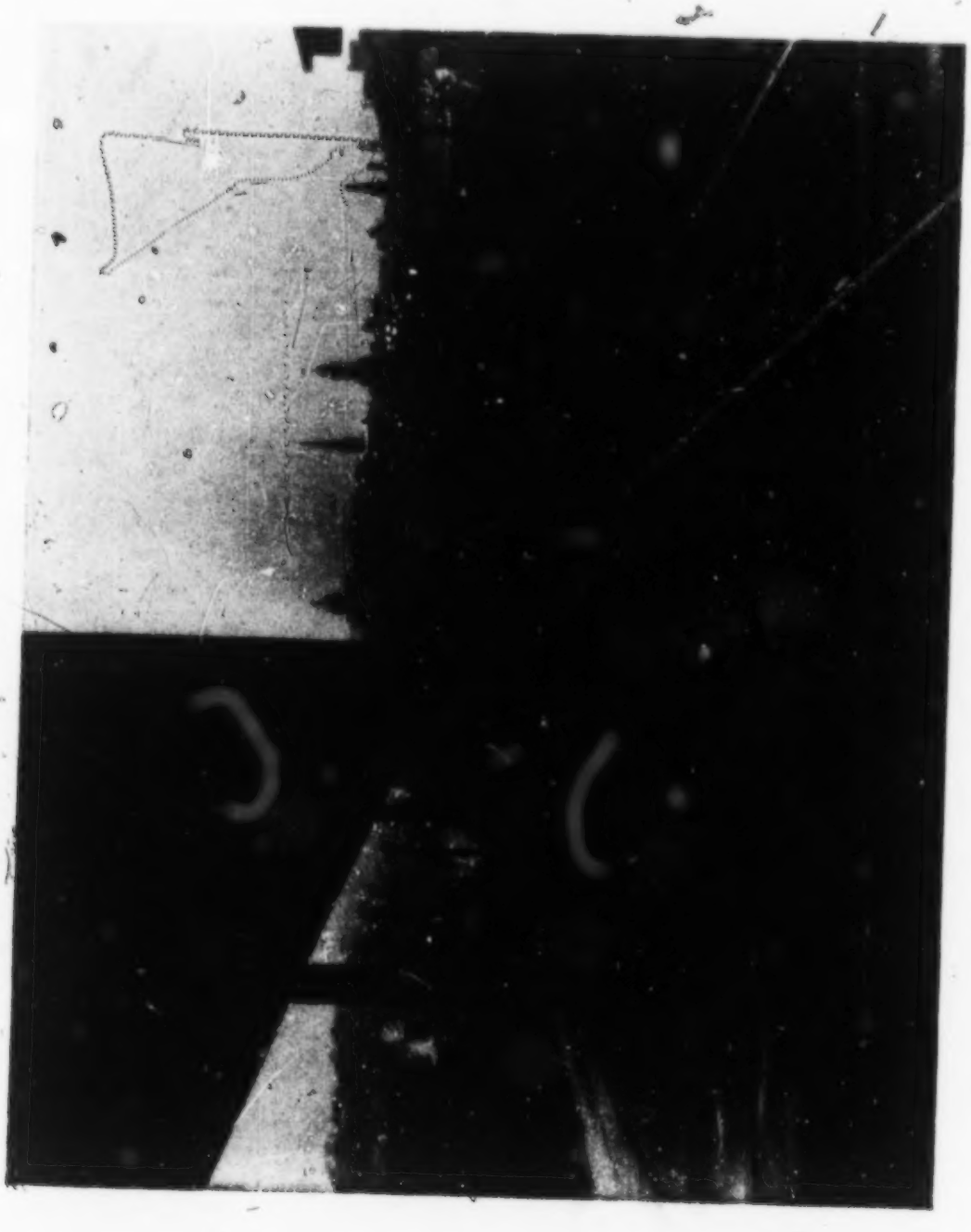
Plaintiff's Exhibit 2F.

Plaintiff's Exhibit 3.

Plaintiff's Exhibit 1A.

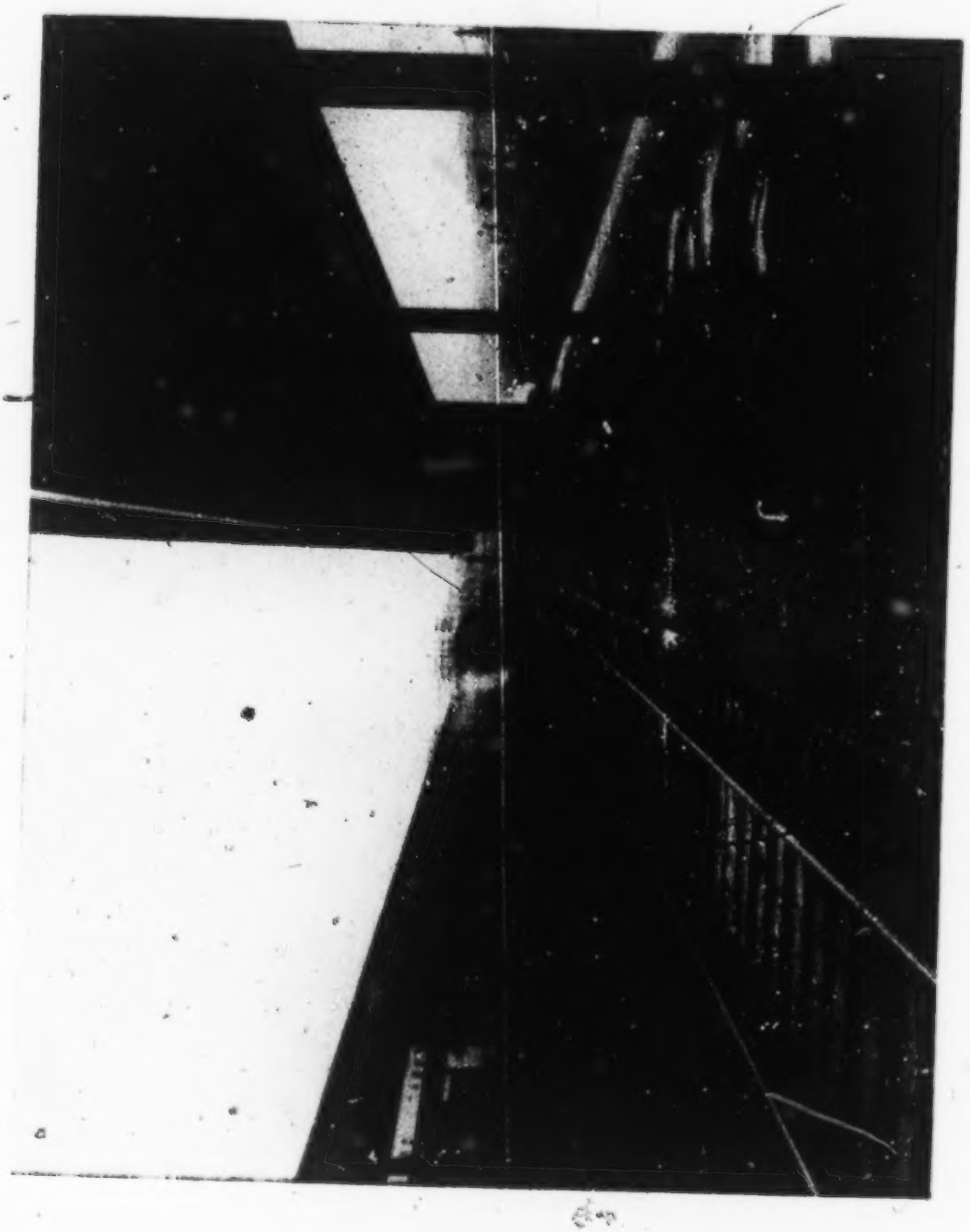
Plaintiff's Exhibit 1.

Plaintiff's Exhibit 2A.



Plaintiff's Exhibit 2B.

Plaintiff's Exhibit 2C.



Plaintiff's Exhibit 2D.

ST.

LINE

BITUMINOUS PLATFORM

TO NEW LONDON

TRACK #3

T. SHELTE

WOOD PICKET FENC

GASPEE

EAST

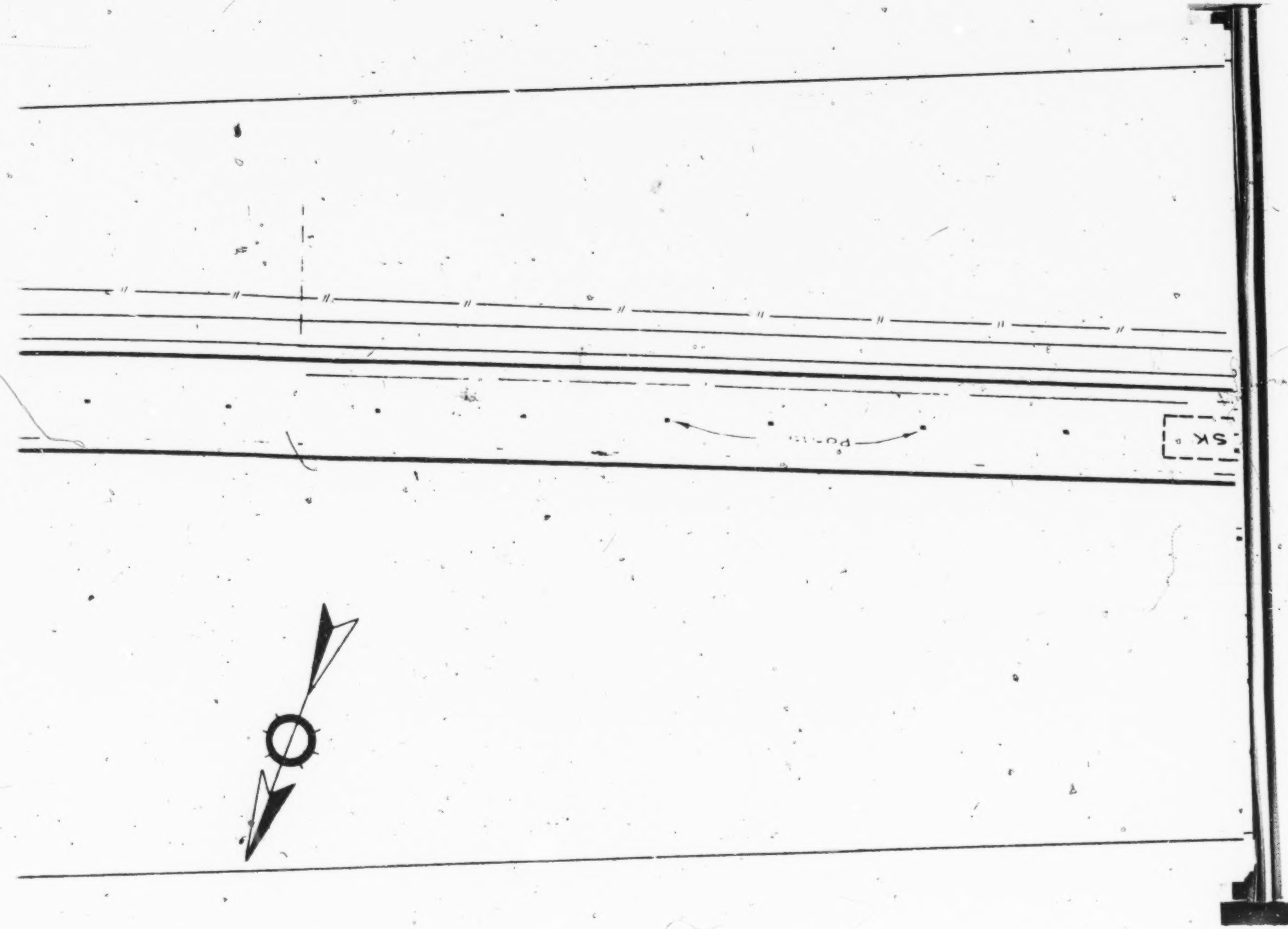
T. SHELTER

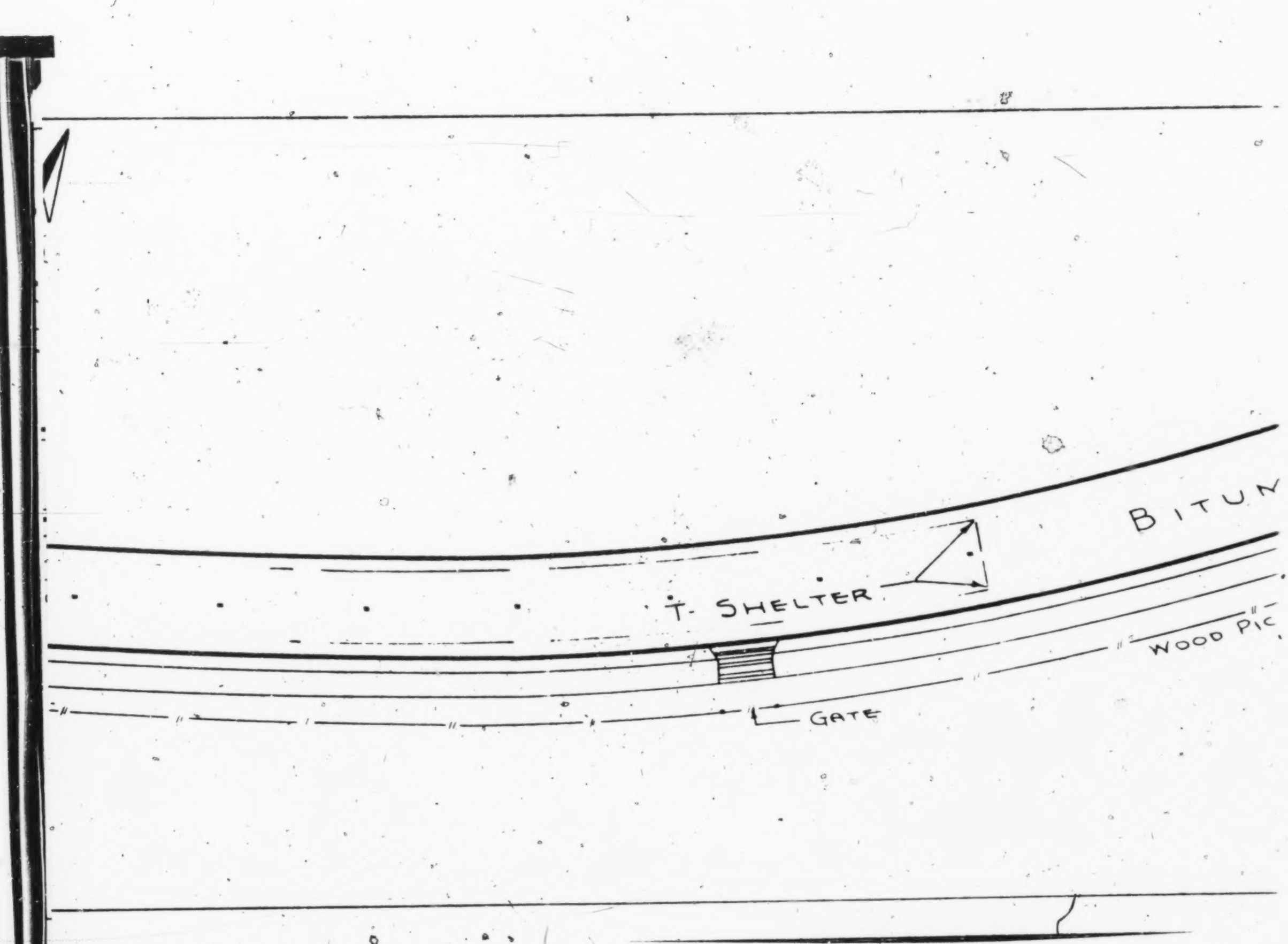
KIOSK

KIOSK

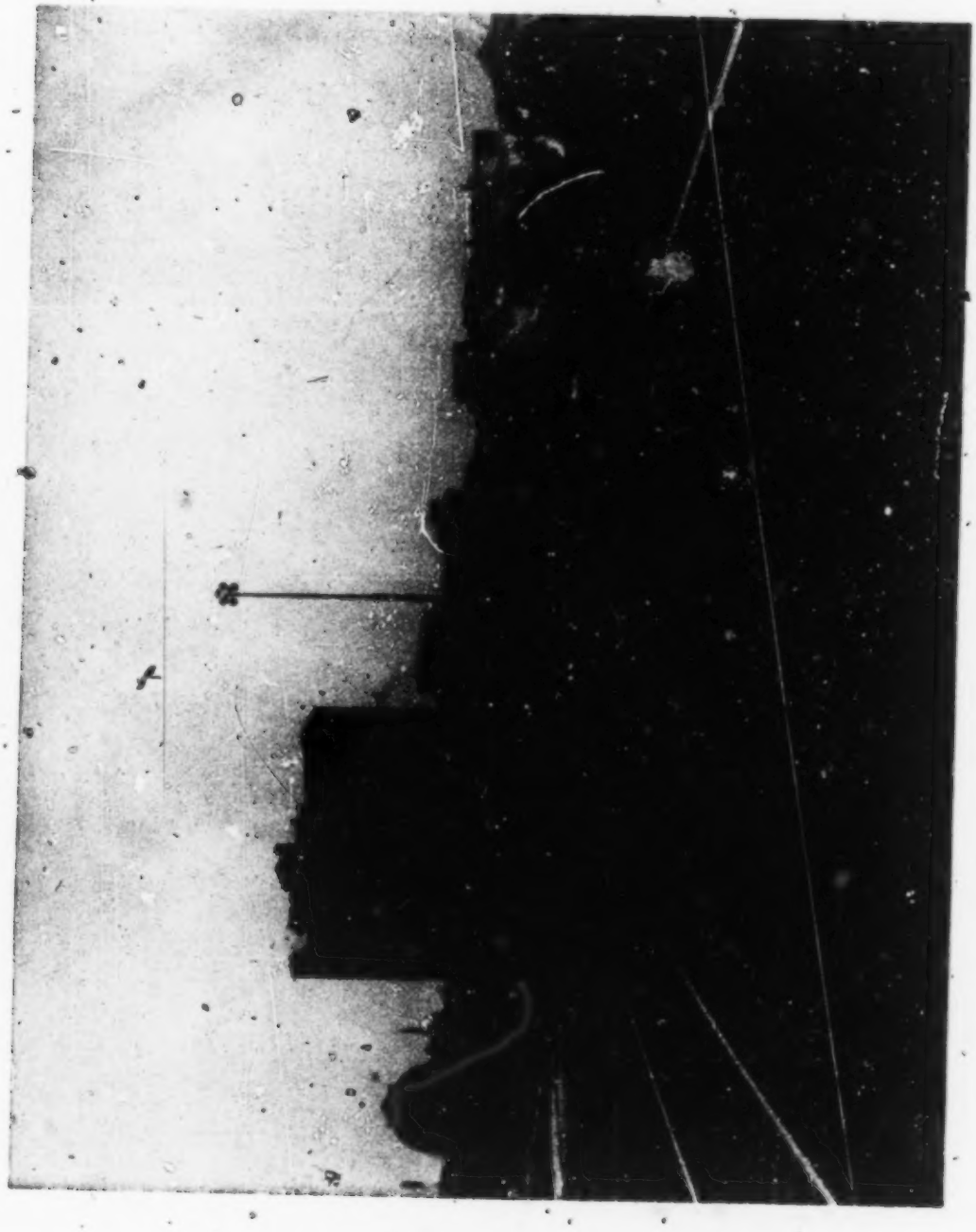
OOD PICKET FENCE

GATE

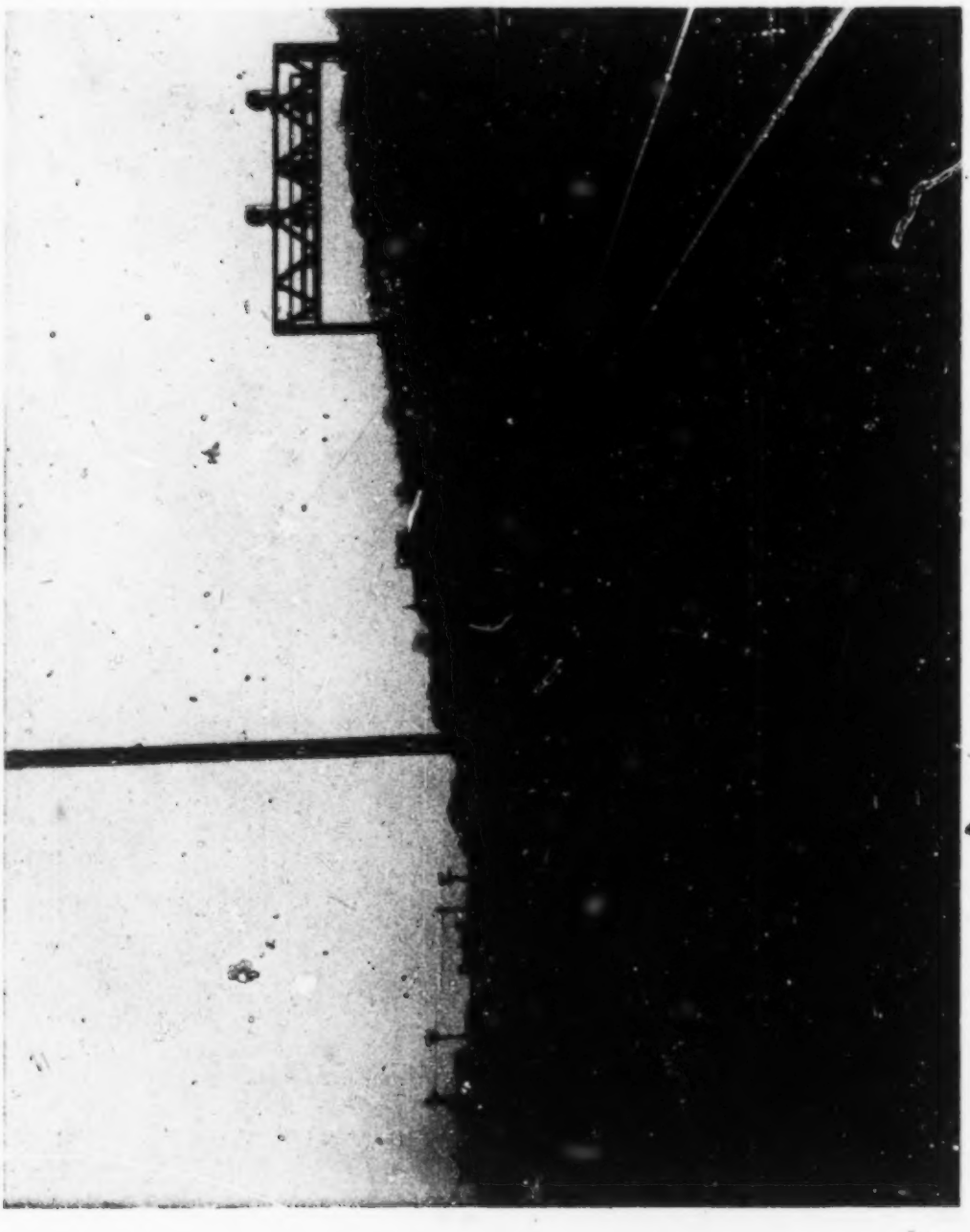

SK


BITUN
T. SHELTER
WOOD PIC
GATE

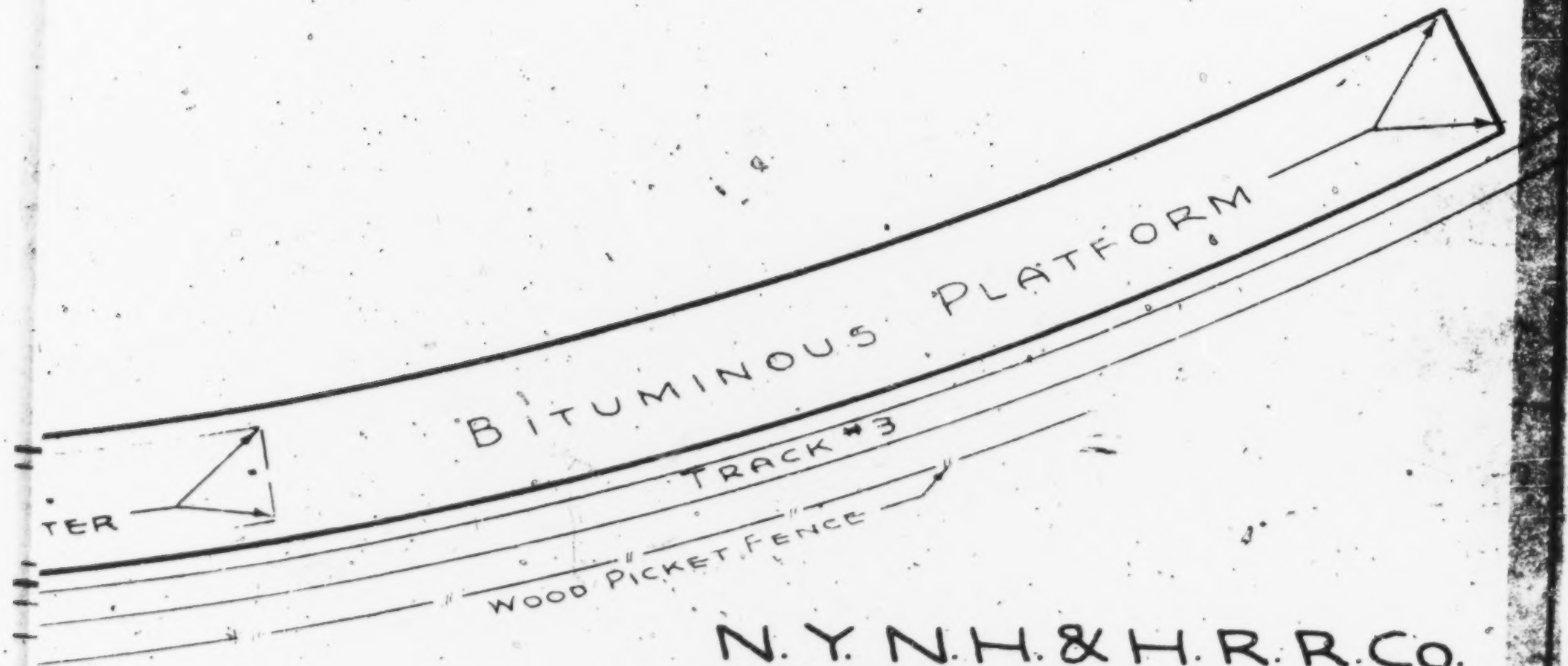
Plaintiff's Exhibit 2E.



Plaintiff's Exhibit 2F.



Plaintiff's Exhibit 3.



N. Y. N. H. & H. R. R. Co.

BOSTON DIVISION MAIN LINE

PLAN SHOWING PORTION OF TRACK #3 & PLATFORM UNION STATION PROVIDENCE, RHODE ISLAND

SCALE 1" = 20'

SURVEY BY AEF "BK"

← To New London

YARD "17

STREET

TK 11

TK 9

TK 7

TK 5

TK 3

TK 1

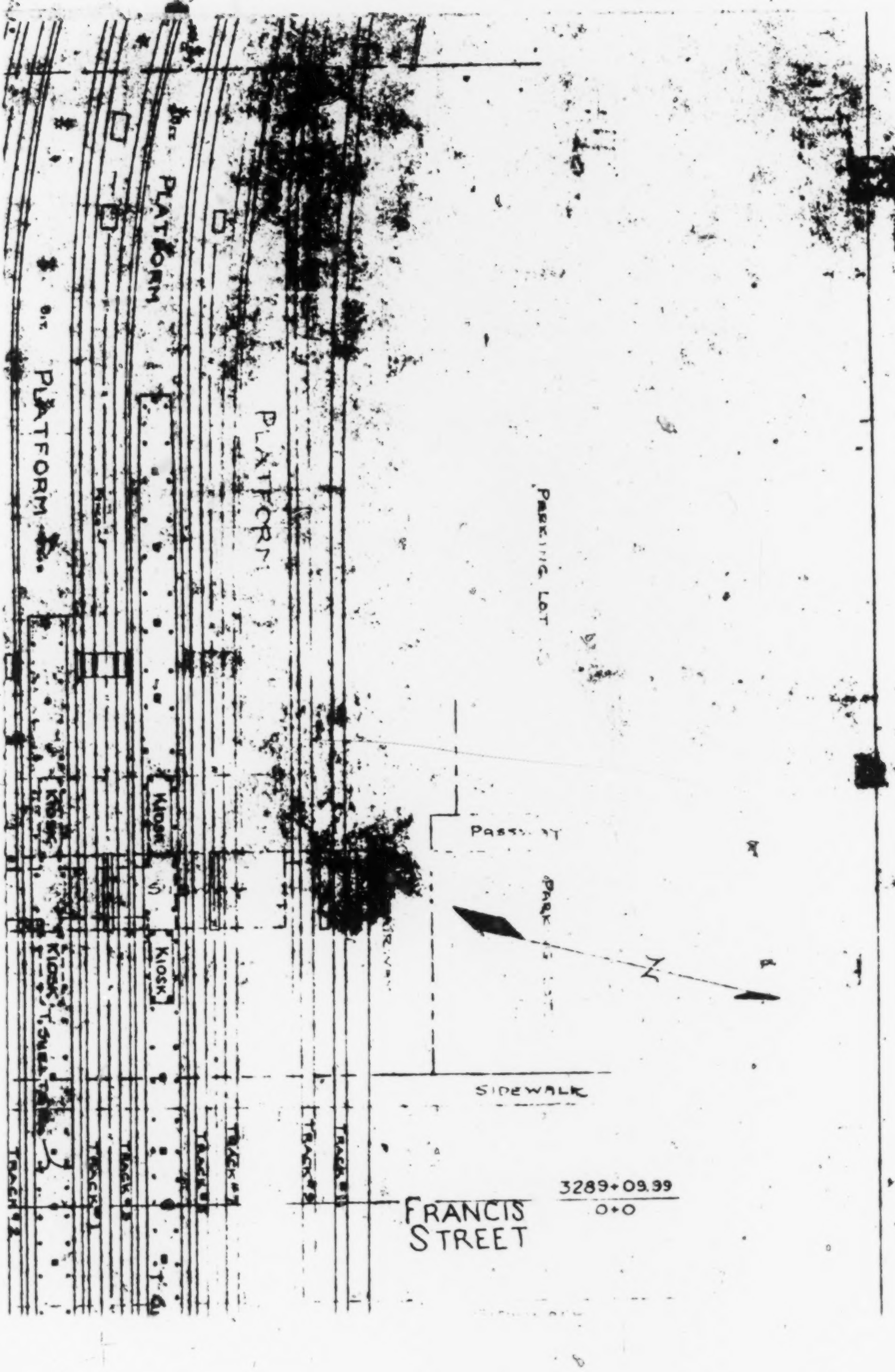
5 Sw

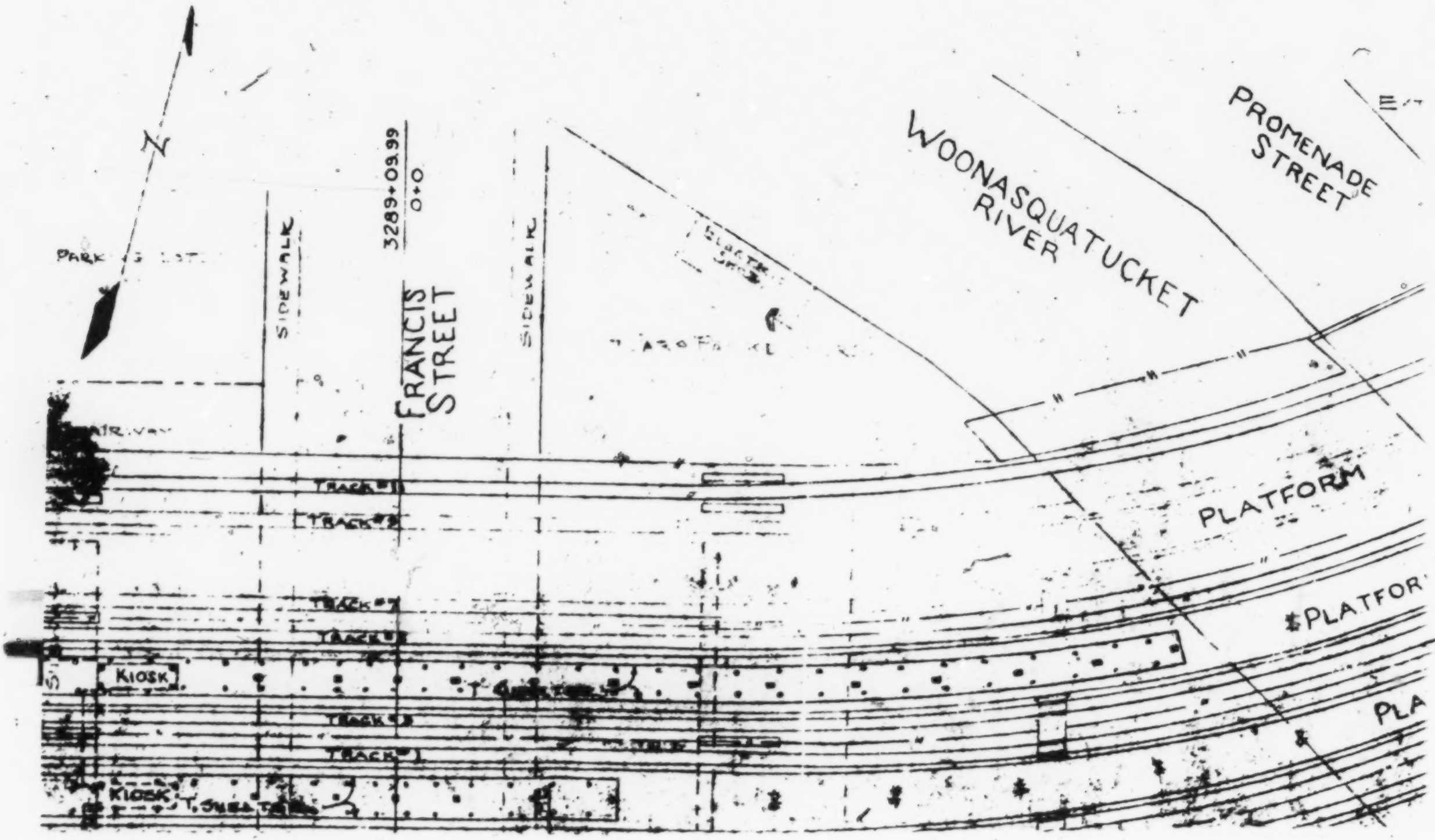
WATER HOSE RACK

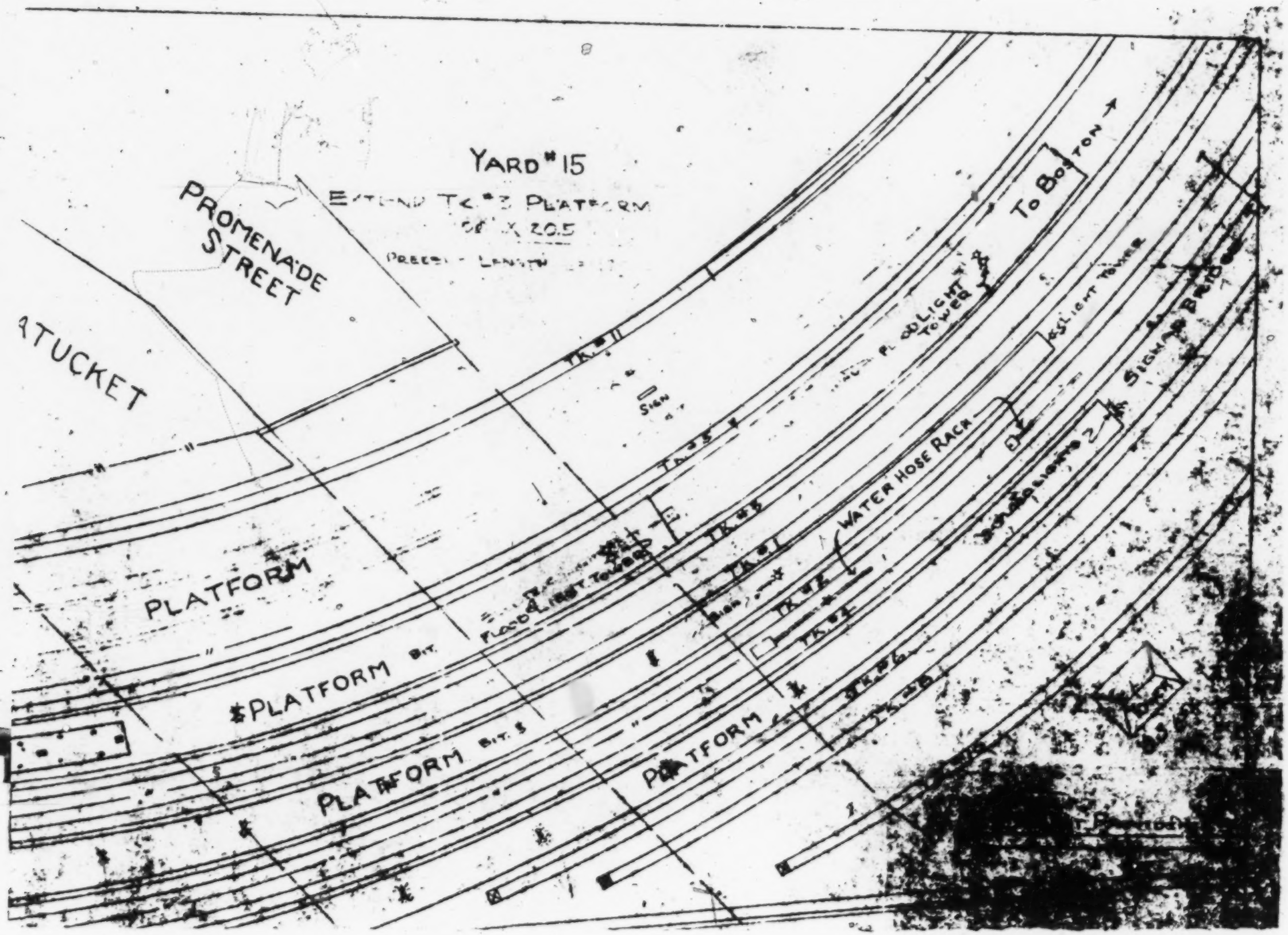
FLOOD LIGHT TOWER

3 FLOOD LIGHTS

PLATFORM


PLATFORM
PLATFORM
PLATFORM
PARKING LOT
KIOSK
KIOSK
KIOSK
KIOSK
SIDEWALK
TRACK 1
TRACK 2
TRACK 3
TRACK 4
TRACK 5
TRACK 6
FRANCIS STREET
3289+09.99
0+0


PARK
SIDEWALK
3289+09.99
0+0
FRANCIS STREET
SIDEWALK
WOONASQUATUCKET RIVER
PROMENADE STREET
PLATFORM
TRACK #1
TRACK #2
TRACK #3
TRACK #4
TRACK #5
KIOSK
KIOSK


YARD # 15
PROMENADE STREET
ATUCKET
PLATFORM
PLATFORM
PLATFORM
To Boston
SIGNAL BRD
WATER HOSE RACK
FLOOD LIGHT TOWER
SIGN

YARD 12

NOTE:

OVERHEAD LIGHTS FLUSH IN ROOF OF T-SHELTER

TWO LIGHTS ON POST IN PLATFORM

3 FLOOD LIGHTS ON TOWER

PLA

PLA

SPE

OFFICE

WEST AF

PLATFORM

PLATFORM

PLATFORM

KIOSK

KIOSK

SHELTER

TRACK

TRAC

TRAC

TRAC

SUBWAY

STAIRS

VESTIBULE

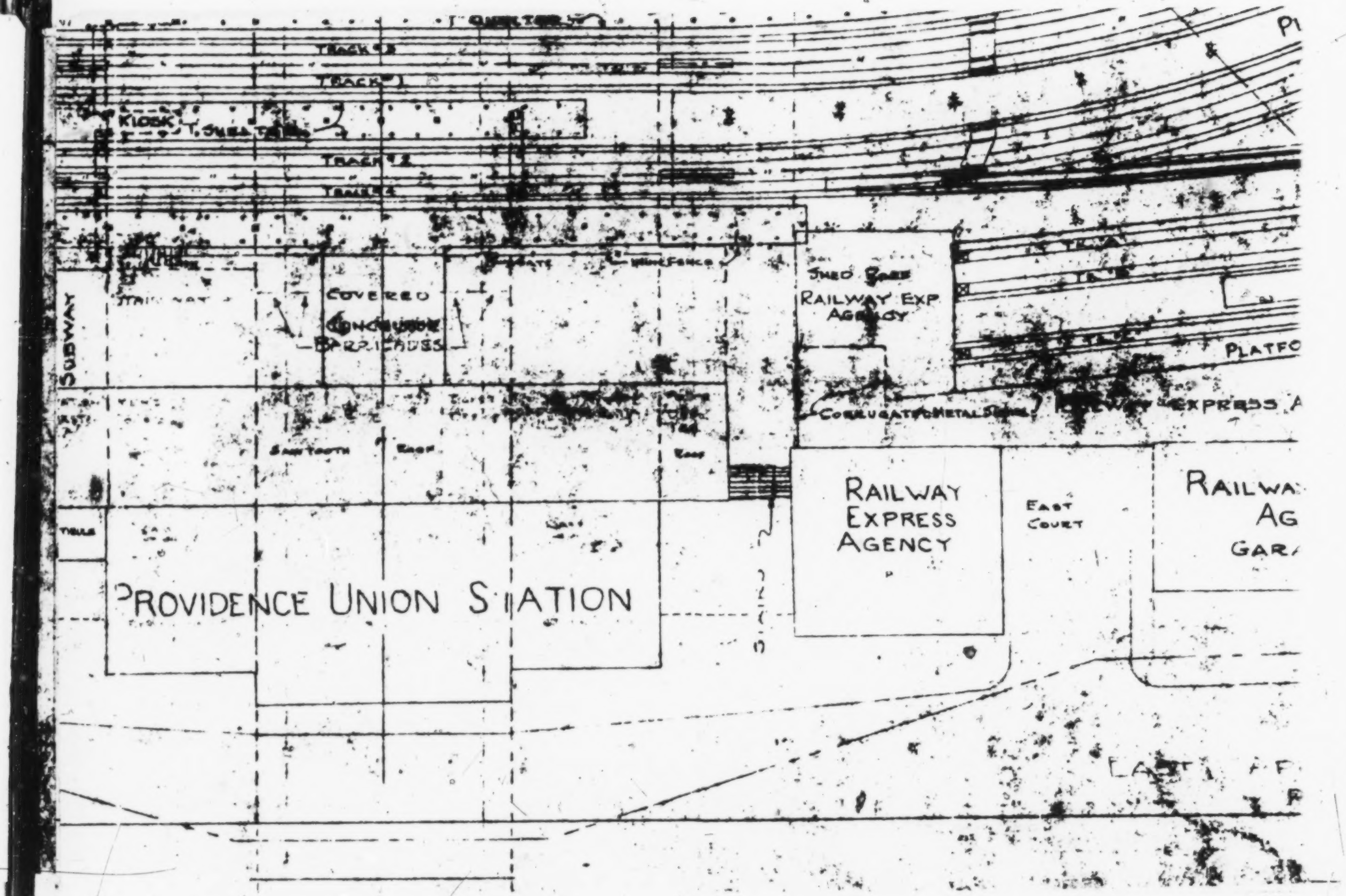
OFFICE BUILDING

WEST COURT

FORMER RESTAURANT BUILDING

PROVIDENCE UN

WEST AFR DACH


TRACK 3
TRACK 2
TRACK 1
KIOSK
COVERED
CONCOURSE
BARRIERS
SUBWAY
SAWTOOTH ROOF
RAILWAY EXP AGENCY
CORRUGATED METAL SIDING
EXPRESS
PLATFO
RAILWAY EXPRESS AGENCY
EAST COURT
RAILWA
AG
GAR
PROVIDENCE UNION STATION

PLATFORM

PLATFORM

CANOPY

PLATFORM

CANOPY

PLATFORM

COVERSHED OVER MAIL PLATFORM

RAMP

EXPRESS AGENCY

EAST COURT

RAILWAY EXPRESS AGENCY GARAGE

N.Y. N.H. & H. R.R. CO.

PROVIDENCE DIVISION — MAINTENANCE

TRACKS – UNION STATION

PROVIDENCE, R.I.

SCALE 1"=40'

PROPOSED TRACK #3

PROPOSED ENCLOSURE FOR MECHANICAL

[fol. 155]

IN UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Record Appendix to Brief for Appellee

STENOGRAPHIC RECORD OF TESTIMONY

* * * * * * *

Mr. Kelleher: It is agreed that as of the day of the accident the plaintiff had a life expectancy as shown by Standard Tables of Mortality of 34.6 years.

The Court: 34.6 years. It is what the Standard Tables of Mortality show is the life expectancy of a wife, woman, a citizen of the United States who on October 11, 1954 was 41 years old.

* * * * * * *

The Court: Mary L. Donnelly Hennegan v. New York, New Haven & Hartford Railroad Company. Motion for new trial and also a motion for judgment notwithstanding the verdict, both being combined. I am perfectly willing to listen to you. I think you ought not spend too much time on it because I am going to make a very strong statement. I can't see how I can grant your motion.

Mr. Deering: Well, may it please the Court, I would like to urge, first, the motion for judgment notwithstanding the verdict. That is based entirely upon the case of Herdman against the Pennsylvania Railroad in 252 U.S. at Page 518. My citation is wrong. It is 352.

* * * * * * *

Mr. Deering: That case is very interesting, your Honor, and I would like to make a comment or two about it, not only because of its similarity to the facts in this case. There a freight train made a very sudden stop to avoid hitting an automobile at a grade crossing, and the conductor who was in the caboose was injured as a result of the sudden stop. The Circuit Court in the Six Circuit in 228 Fed. 2d at 902 said:

[fol. 156] "We think the District Judge correctly performed his duty in directing a verdict for the appellee.

There was a complete absence of probative facts to support the conclusion of negligence."

In that case the Supreme Court granted certiorari, and it went up with a group of other cases, which of course your Honor is familiar with. There was the Rogers case. There was an opinion written by Mr. Justice Brennan shortly after he went on the Court, and I think he outdid some of the opinions, perhaps, written by Mr. Justice Black and Mr. Justice Douglas earlier. Interestingly enough, Mr. Justice Brennan wrote this opinion sustaining the Circuit Court and the Court below in directing the verdict for the defendant. It seems that if there is a hole in the armor which the Court has set up around the directing of verdicts in Federal Act cases that this is it, that the Court reached this point and refused to say that it was negligence for an engineer of a train to make a sudden stop when met with an emergency, as in this case —in the Herdman case an automobile coming upon the track, and here we have the woman coming upon the track.

The Court: You ignore what was argued to the jury by Mr. Kelleher. It was not without a straw of evidence to support it. His argument was that the engineer should have seen earlier.

Mr. Deering: And I think I argued to the jury that if he had seen her that moment earlier when she had been on the platform standing in a position of safety that he would have had no reason to have believed that she was going out on the track until she made that movement toward the track, which might have been a momentary movement, probably a fraction of a second, and he would have done exactly the same thing had he seen her walking [fol. 157] from the platform towards the track that he did when he saw her actually stepping on to the track.

The Court: You persuaded the thirteenth juror but not the twelve.

Mr. Deering: Well, I think that in that situation—it is not a situation of this kind, it is not a question of fact for the jury to pass upon but is a question of fact—not a question of fact but a question of law for the Court to

rule, as the Court did in the Herdman case, that the plaintiff had not sustained the burden of proving negligence.

* * * * * * *

Mr. Deering: I think that is practically all I care to say in regard to the Motion for a Directed Verdict.

The Court: This is a perfect case which I would be very happy to see nine men treat. I would love to have you successful in getting to the Supreme Court of the United States, and I am not going to block you from getting there.

Mr. Deering: Well, I would also like to address a few remarks to the Motion for a New Trial. I think that in view of your Honor's indicated position on the Motion for Directed Verdict that it is all the stronger case for a Motion for a New Trial because I think it is apparent that the jury in this case disregarded the law as given by your H[illegible]r.

The Court: I cannot say that. I can only say that if this were a case in which a verdict was permissible for the plaintiff, then I don't think they disregarded my instructions. I am going to indicate very shortly what my views are, and I am going to help you get to the Supreme Court, but I am not going to help you much here.

Mr. Deering: Well, then perhaps in view of that there is no need for me to continue further.

* * * * * * *

[fol. 158]

PLAINTIFF'S EXHIBIT 6

PETER BENT BRIGHAM HOSPITAL

DISCHARGE NOTE

Address: 21 Belvedere Street, Boston, Massachusetts

Date of Admission: Oct. 11, 1954.

Date of Discharge: Oct. 28, 1954.

Condition on Discharge:

Improved [ ] Unimproved [ ]
Discharged against advice [ ] Deceased [ ]

Disposition:

Staff Member: Dr. Henry Banks, P.B.B.H.

Family Physician:

Address:

Out-Patient Department Appointment Date:

Follow-Up Clinic Appointment Date:

Special Clinic Appointment Date:

Medical Examiner:

Accepted [ ] Refused [ ] No jurisdiction [ ]

Autopsy permission obtained by refused to

Significant history, physical examination, laboratory data, roentgen findings, hospital course and therapy. Recommended therapy.

HISTORY:

This was the first P.B.B.H. admission of this 37-year-old white female, N.H. Railroad attendant, who entered with the chief complaint of pain in her neck and left shoulder of one hour's duration. One hour prior to admission, the patient was working on a New Haven train as it left Providence, it suddenly made an emer-

gency stop. She was standing in the grille car and allegedly was tossed about in a manner which twisted her neck. Details of the accident are not obtainable from the patient. The patient noticed immediate pain [fol. 159] down the back of her head and between her shoulders, and was unable to move her neck or back without pain. Later in the day she developed pain in her left shoulder and limitation of motion in her left shoulder. She spent the afternoon in the OPD sedated heavily and because of a hysterical reaction, the patient is very vague and uncooperative.

PHYSICAL EXAMINATION:

This is a w.d., w.n. white female lying supine in bed with her head and left shoulder held immobile. She is in no acute pain but is extremely uncooperative and hysterical. B.P. 118/65, P. 76, T. 100, R. 22. There was some tenderness over C-6 and C-7. She is unable to rotate her neck because of pain and there was no swelling or redness seen anywhere, in her neck. The patient did not see any reason for an abdominal examination and refused it as did she refuse a pelvic examination. There was tenderness over the left deltoid and trapezius with greatest tenderness over the acromium and anterior shoulder joint. No deformity was seen. The patient flexed the left humerus 30 degrees and abducted it 90 degrees, and extends it 30 degrees before pain limits motion. Her other extremities were normal.

LABORATORY DATA:

Hinton negative. Blood group A Rh-positive. Urinalysis on admission showed 4-5 w.b.c. in the sediment. Hematocrit was 46, W.B.C. 10,800 with 80% polys. X-rays of her ribs, left shoulder, internal rotation and external rotation, and multiple views of the cervical spine failed to demonstrate any fracture or dislocation or other abnormality.

HOSPITAL COURSE:

The patient was placed in Sayer head traction and [fol. 160] heavily sedated during her stay. On the 16th hospital day, the patient was taken out of head traction having vastly improved and put into a Thomas collar with which she was discharged on the 18th hospital day.

DIAGNOSIS: Acute neck strain.
Hysterical reaction.

OPERATIONS: None.

COMPLICATIONS: None.

MEDICATIONS: None.

DISPOSITION: Home to be followed by Dr. Henry Banks.

(DR. ROBERT NEWTON)

RN/rh

Signature of Staff Member
responsible for care (s) HENRY BANKS

11/19/54 Disc Summary sent to MR. C. T. CONLEY, N.Y. N.H. & Hartford R.R. Co., South Station, Boston 10, Mass.

List in consecutive order the codified diagnoses, complications, roentgen diagnoses, pathologic diagnoses and operations with anesthesia dates

Diagnosis: 030-43X Acute neck strain
Hysterical reaction

[fol. 161] PETER BENT BRIGHAM HOSPITAL

DISCHARGE NOTE

Address: 21 Belvedere St., Boston.

Date of Admission: 7.12.57.

Date of Discharge 8.3.57.

Condition on Discharge:

Improved [ ] Unimproved [ ]
Discharged [ ] Deceased [ ]
against advice

Disposition:

Staff Member: Doctor Banks, PBBH. (One copy, 8.27.57.)

Family Physician:

Address:

Out-Patient Department Appointment Date:

Follow-Up Clinic Appointment Date:

Special Clinic Appointment Date:

Medical Examiner:

Accepted [ ] Refused [ ] No jurisdiction [ ]

Autopsy permission obtained by refused to

Significant history, physical examination, laboratory data, roentgen findings, hospital course and therapy. Recommended therapy.

HISTORY:

This was the 2nd PBBH admission of this 39-year old, former railroad worker, with chief complaint of cervical radiculitis. Patient suffered a whiplash injury when a train in which she was riding, made a sudden stop, in October '54. She had shoulder and neck pain, tenderness over C 6 and C7 and difficulty with neck and shoulder motions. She was successfully treated at that time with traction and a head collar. Since

then, she has continued to have intermittent complaints which have worsened in the past six months. She now complains of fear of neck movements because of pain, left shoulder pain radiating into the forearm and [fol. 162] paresthesias of the 2-5 digits of left hand and questionable left hand weakness. She was admitted on 7.12.57.

PHYSICAL EXAMINATION:

P. 76: R. normal. BP 140/70: T. normal. Patient was a w.d., w.n., white female in distress from neck pain. Abnormal findings include hypalgesia over the complete hand, from the wrist down, with the exception of the thumb. There was tenderness over C5 and C6 cervical vertebrae and over a 2 x 2 cm. area on the posterior surface of the right trapezius muscle. There was limitation of motion of the neck in flexion, extension and rotation. There was limitation of motion of the left shoulder due to pain.

LABORATORY DATA:

Routine blood and urine studies were within normal range. Sed. Rate was 8 to 15. Xrays of cervical spine revealed it to be within normal limits except for an apparent, slight decrease in flexion. A myelogram with special attention to the cervical spine, was normal. Spinal fluid protein was 70 to 49 mgm.%. 5 RBC were found in spinal fluid.

HOSPITAL COURSE:

Patient was seen in consultation by Doctor Tyler, who felt that patient had a severe disuse syndrome of left shoulder. No definite root lesions were found. Patient's reflexes were all found to be normal. On a second consultation, Doctor Tyler felt that there was no damage to patient's central or peripheral nervous systems. An LP, done at Doctor Tyler's suggestion, revealed opening pressure of 135 mm H_2O, closing pressure of 130 mm. H_2O. Fluid was clear, noncloudy. Queecken-

stadt Test was negative. Patient was seen by Doctor Bering, who suggested a myelogram, as he felt that patient had real disease. Doctor Bojar saw patient [fol. 163] and felt that she had definite hysterical features. He was unable to say definitely how much of patient's complaints were due to neurosis and how much to possible organic disease. After this extensive study by various laboratory tests and Consultants, a diagnosis was made of cervical radiculitis, with a psychosomatic overlay.

Signature of Staff Member
responsible for care (s) HENRY BANKS

List in consecutive order the codified diagnoses, complications, roentgen diagnoses, pathologic diagnoses and operations with anesthesia dates

DIAGNOSIS: Cervical radiculitis, with psychosomatic overlay 97811-190 000-x00

[fol. 164] PETER BENT BRIGHAM HOSPITAL

7/17/57 PSYCHIATRIC NOTE

Miss Donnelly was followed in psychotherapy over a period of about 8 months because of her severe emotional reaction to the incident which dates the onset of the present illness. She had withdrawn completely from all social contact, even avoiding some members of the family. She had become preoccupied with feelings of guilt over fantasied events. Much of this stemmed from her thought that she could have prevented the train from striking the woman who attempted suicide by jumping in front of it. (This is the story related to explain the sudden stopping of the train when she lost her balance and fell.) Dynamically, this aroused repressed feelings of hostility about which she felt guilty. Even today, she feels people think of her as capable of aggressive action. The anxiety related to these feelings led to the escape by withdrawal and isolation. She has at times construed her physical Sx as in-

dicative of the punishment she felt she was to receive for her hostility.

Psychotherapy was discontinued in Oct. 1956, when she had improved to the point that she was able to socialize enough to assist her father in political electioneering in November.

Emotionally, she is still considerably improved on the social level, but it was not possible to develop insight into the dynamics of her guilt feelings with the associated anxiety because of the strong defense of denial.

There are definite hysterical features here, but I have not been able to determine satisfactorily to what extent she has conversion symptoms or to what extent organically determined symptoms have been utilized in the neurosis.

Thank you

(s) S. Bojar

[fol. 165]

PLAINTIFF'S EXHIBIT 7A

N.Y. N.H. & H. R.R. Co.
Mass. Claims Department
Nov. 26, 1954
Boston, Mass.

Mr. J. C. Hildrich,
Mr. G. R. Luxenburger,
Mr. E. T. Conley,
Mr. J. A. Murtaugh.

November 10, 1954

Below please find statement showing time by weeks of earnings made by Mary L. Donnelly employed as Attendant who was injured at Providence, R. I. on October 11, 1954.

1	Week	Ending	10/ 9/54	Amount	70.32
2	"	"	10/ 2/54	"	67.68
3	"	"	9/25/54	"	67.68
4	"	"	9/18/54	"	67.68
5	"	"	9/11/54	"	67.68
6	"	"	9/ 4/54	"	85.07
7	"	"	8/28/54	"	65.28

8	Week	Ending	8/21/54	Amount	66.18
9	"	"	8/14/54	"	65.28
10	"	"	8/ 7/54	"	65.28
11	"	"	7/31/54	"	65.28
12	"	"	7/24/54	"	65.28
13	"	"	7/17/54	"	65.28
14	"	"	7/10/54	"	54.40
15	"	"	7/ 3/54	"	54.97
16	"	"	6/26/54	"	65.28
17	"	"	6/19/54	"	65.28
18	"	"	6/12/54	"	65.28
19	"	"	6/ 5/54	"	68.68
20	"	"	5/29/54	"	65.28
[fol. 166]					
21	"	"	5/22/54	"	65.28
22	"	"	5/15/54	"	65.28
23	"	"	5/ 8/54	"	65.28
24	"	"	5/ 1/54	"	65.52
25	"	"	4/24/54	"	21.76
26	"	"	4/17/54	"	65.96

TOTAL $1,672.22

FOR 26 Weeks, Man's average is $ .....

(s) G. HUTCHINSON
JM

[fol. 166a]

IN UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5511

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant, Appellant,

vs.

MARY L. DONNELLY HENAGAN, Plaintiff, Appellee.

STATEMENT OF POINTS RELIED ON BY THE APPELLANT ON APPEAL

1. The Court erred in not allowing the Defendant's Motion for a Directed Verdict presented at the time of trial.
2. The Court erred in denying the Defendant's Motion for Judgment Notwithstanding Verdict.
3. The Court erred in denying the Defendant's Motion for a new trial.

By its Attorney, Noel W. Deering, 532 South Station, Boston 10, Mass.

MINUTE ENTRY OF ARGUMENT—October 6, 1959
(omitted in printing)

[fol. 167]

IN UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 5511

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Defendant, Appellant,

v.

MARY L. DONNELLY HENAGAN, Plaintiff, Appellee.

Appeal From the United States District Court for the District of Massachusetts.

Before Woodbury, Chief Judge, and Hartigan and Aldrich, Circuit Judges.

Noel W. Deering, with whom *David W. Walsh* was on brief, for appellant.

James W. Kelleher, with whom *James R. DeGiacomo* was on brief, for appellee.

OPINION OF THE COURT—November 27, 1959

Woodbury, Chief Judge. On October 11, 1954, the plaintiff-appellee was employed by the defendant-appellant as a grill-car waitress on its regularly scheduled passenger train which left Boston at 7 A.M. bound for New York. As the train, proceeding at 12 to 15 miles per hour, entered the Providence, Rhode Island, railroad station about an hour later, the engineer made an emergency application of the brakes in an unsuccessful attempt to avoid running over a woman who stepped from the station platform onto the [fol. 168] tracks in front of the locomotive, obviously and concededly for the purpose of committing suicide.

At the time the brakes were applied the plaintiff was standing at the service counter at the forward end of the grill-car waiting for food from the kitchen. She was thrown

against the counter by the sudden stop of the train but she did not fall, although some of her fellow employees in the car lost their footing, and silverware, dishes and kitchen utensils in the car were thrown to the floor. The plaintiff immediately gave evidence of pain, principally in her shoulders and neck, and became hysterical. She was removed from the train at Providence and, with another girl car employee who was injured, sent back to Boston and there hospitalized. No serious physical injury has ever been found by the medical men who have examined her. There is no doubt, however, that since the event of October 11, 1954, she has suffered more or less acutely from paranoid psychosis, described by her medical expert at the trial as ". . . a mental disease characterized by suspiciousness, by the presence of ideas of guilt and reference to one's self of events not connected with one's self." To quote from the same source, her belief since 1954 or 1955 has been " . . . that she herself was personally responsible for the death of the woman who fell or jumped in front of the train on which she worked in 1954, just as though she were herself a murderer," and that " . . . there was going to be a murder trial at which she herself was to be the defendant." There is ample evidence, and indeed it appears to be conceded, that because of her mental condition the plaintiff has been unable to work or care for her family since the accident and that the prospects of her eventual recovery are not very bright.

In due course the plaintiff brought suit against the defendant in the court below under the Federal Employers' [fol. 169] Liability Act[1] and a trial by jury resulted in a verdict for the plaintiff on which the court immediately entered judgment. The defendant within the time limited by the rules moved for judgment notwithstanding the verdict and also for a new trial. Hearing was held on these motions at the conclusion of which the court announced:

"I am denying both motions. On the defendant's Motion for Directed Verdict I have endorsed this:

---

[1] 35 Stat. 65, as amended, 36 Stat. 291, 53 Stat. 1404, 45 U.S.C. § 51 *et seq.*

'This motion was presented to the Court before the case went to the jury. The Judge waved aside the motion and said it was 'denied' but the denial is not meant to be final but merely meant the Judge refused to act upon it until after the jury returned its verdict. The jury having returned its verdict this Judge would grant the motion were he free to do so. But obedient to what he understands to be the views of a majority of the Supreme Court of the United States and solely in response to such command this Court denies the motion. Wyzanski, J., January 13, 1959.'

"On the Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, I have endorsed this as follows: 'This Motion would be granted by this Court were it free to do so, but this Court construes the opinions and judgment of the Supreme Court of the United States as giving him no option but to deny the motion. Wyzanski, J., January 13, 1959.'"

The court then said in elaborating its views:

"In my opinion there was no evidence whatsoever of negligence on the part of the engineer. I cannot read the record as a whole in a way to find any evidence [fol. 170] of negligence. But I know that my method of reading the record is different from that of a majority of the Supreme Court of the United States as exhibited in past cases, and I hope I am a lawful judge, and I recognize the limits of my authority, whether appellate judges do or not."

Furthermore, the court indicated that in its opinion the plaintiff had failed to establish causation. It said:

"With respect to the aspect of causation I also believe that the plaintiff failed to bear the burden of proof. I do not believe that the condition which the plaintiff had even on the plaintiff's medical testimony can legitimately be said to have resulted in whole or in part from the incident which occurred at the Providence Station on the 11th of October, 1954.

. . . . . .

"There is no sensible medical explanation which I have ever heard that makes the onset of insanity or mental incompetence legally the result of a situation such as existed in the Providence Station, and I regard the jury as having reached a preposterous conclusion."

The defendant below did not appeal from the denial of its motions for judgment notwithstanding the verdict and for a new trial. It did, however, seasonably appeal from the judgment entered on the verdict prior to the filing of its motions. Having moved at the appropriate time for a directed verdict, it can here challenge the sufficiency of the evidence to take the plaintiff's case to the jury. And, having moved within the time fixed in the Rules for judgment notwithstanding the verdict, it can properly ask this court for remand to the court below for the entry of judgment in its favor, not merely for a new trial. *Cone* v. *West* [fol. 171] *Virginia-Paper Co.*, 330 U.S. 212 (1947); *Johnson* v. *New York, N.H. & H.R. R. Co.*, 344 U.S. 48 (1952), and cases cited.

In *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 506, 507 (1957), the Court said with reference to the Federal Employers' Liability Act: "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." And then the Court said: "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death."

The test is simply and easily stated. The trouble comes in applying it, for what may be entirely reasonable to one person may be utterly unreasonable to another. The Supreme Court of the United States, of course, has the final say in these cases as to what is or is not a reasonable conclusion to draw from the evidence. And we recognize that in recent years the Supreme Court has allowed juries great latitude in deciding what may or may not be a reasonable conclusion to draw from the evidence in cases under

the Federal Employers' Liability Act. We do not, however, read the Court's recent decisions as depriving trial judges in cases like this of their historic function of exercising a preliminary judgment on the facts to determine whether the plaintiff has shown enough to warrant a fair-minded jury in returning a verdict in his favor. *New York, New Haven & Hartford Railroad Co.* v. *Dox*, 249 F.2d 572, 573, 574 (C.A. 1, 1957). We think trial judges still have the duty, in these cases as in others, to screen the evidence to ascertain whether it is enough to persuade reasonable minds that some negligence of the employer contributed in some way or another to the plaintiff-employee's injury. [fol. 172] And we think the various courts of appeal still have a function to perform in reviewing the decisions of the district courts in their respective circuits on this matter. See the *Dox* case *supra*.

But of course, these functions, trial and appellate, are to be performed with an eye to the trend indicated by recent decisions of the Supreme Court. With this trend in mind, we turn to consideration of the evidence.

Trains from Boston to New York approach the Providence railroad station from the east on a gradual curve to the right. The platform for the accommodation of passengers, which is only a matter of inches above the top of the rails, was on the right of the train as it came into the station on track No. 3. The right hand rail of track No. 3 (we refer to right and left from the point of view of the engineer of the train, who was in his seat on the right hand side of the cab near the front of the diesel locomotive), is about two feet from the edge of the platform. The rails are 4 feet 8½ inches apart and about two feet to the left of the left hand rail there is a picket fence separating track No. 3 from the next track to the south, track No. 1.

The engineer testified that he first noticed the suicide as she stepped over the rail nearer the platform and that she was then 35 or 40 feet away. He said that at first he thought she had gone onto the track to pick up some object lying between the rails and did not realize that she either could not or did not intend to step back into safety until she had proceeded in the direction of the fence to the

vicinity of the further rail when she turned toward the locomotive and started to squat or kneel down and that thereupon he immediately made an emergency application of the brakes bringing the train to a stop in about 80 feet which was the shortest distance in which it could be stopped at 12 to 15 miles per hour on dry rails with brakes in proper [fol. 173] order, as they were at the time. The suicide's body was picked up under the wheels of the train about 68 feet back of the front of the locomotive.

Plaintiff's counsel does not suggest that if the engineer first saw the suicide when she was only 35 or 40 feet away he ought to have realized that he could not then stop the train in season to avoid running over her and so in the exercise of due care toward passengers and fellow employees on the train he should have made a gentler application of the brakes. Nor does he argue that an emergency application of the brakes was negligence in and of itself. See *Herdman* v. *Pennsylvania R. R. Co.*, 352 U.S. 518 (1957). His contention in a nut shell is that it could reasonably be found on the evidence in the record that in the exercise of due care the engineer should have seen the would-be suicide and sized up the situation sooner than he did and that had he done so, he could have brought the train to a stop without running over her.

Counsel for the plaintiff makes a rather involved argument in the attempt to show that on the evidence in the record the jury could reasonably infer that the woman was in the engineer's sight on the track an "obvious suicide" when the train was some 160 to 180 feet away so that, had the engineer acted as promptly as he should, he could have brought the train to a stop without running over the suicide and even without the necessity of an emergency application of the brakes. On analysis the argument impresses us as fallacious. We see no need to discuss it, however, for we think that the trend of recent decisions of the Supreme Court indicates that the jury was entitled to return a verdict for the plaintiff on the engineer's testimony standing alone.

It is true that no eyewitness to the tragedy, and there were several, placed the front of the locomotive more than

40 feet away, about one half the distance in which the [fol. 174] train could possibly be stopped, when the suicide stepped off the platform onto the track. But the engineer said that he watched the suicide walk across the tracks toward the fence believing that she could and would get off the tracks and that he did not apply the brakes until she turned toward the locomotive and started to squat or kneel. From this it could well be inferred that the engineer did not apply the brakes as soon as he should. Indeed, from the testimony that the train could be stopped in 80 feet and the testimony that the suicide's body was picked up 68 feet back of the front of the locomotive, it would appear that although the engineer first saw the suicide when she was 40 feet away he did not apply the brakes until she was only 12 feet in front of the locomotive. It is true that the engineer's testimony only tends to indicate that he might not have applied the brakes as soon as due care required and has no tendency to show by a balance of probabilities, or that it was more probable than not, that an emergency application of the brakes when the suicide first stepped on the tracks could have brought the train to a stop soon enough to avoid hitting her. But recent decisions of the Supreme Court in cases under the Federal Employers' Liability Act, indeed, the applicable rule quoted above, seem to us clearly to indicate abandonment of the traditional rule that plaintiffs have the burden of persuasion in actions for negligence, at least insofar as actions for negligence under the Act are concerned, and that only the barest possibility of causation is enough to make out a case for the jury. Thus, although we can discern from the engineer's testimony only the faintest scintilla of evidence to suggest the inference of any causal connection between the engineer's possibly negligent failure to apply the brakes sooner than he did and running down the suicide, nevertheless, as we read recent decisions of the Supreme [fol. 175] Court, we feel that the plaintiff has shown enough to take her case to the jury.[2]

[2] See, for instance, *Harris* v. *Pennsylvania R. R. Co.*, decided October 13, 1959.

As to the causal connection between the plaintiff's mental condition and the running down of the suicide, it is enough to say that the plaintiff's medical expert so testified.

The question whether the court below might properly have granted the defendant a new trial in the hope that another jury might return a verdict more in keeping with the great weight of the evidence is not before us, for the defendant did not appeal from the denial of its motion for a new trial.

Judgment will be entered affirming the judgment of the District Court.

[fol. 176]

IN UNITED STATES COURT OF APPEALS

JUDGMENT—November 27, 1959

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court: Roger A. Stinchfield, Clerk.

Thereafter, on December 15, 1959, mandate was stayed until further order of Court.

[fol. 177] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 178]

SUPREME COURT OF THE UNITED STATES

No. 709, October Term, 1959

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Petitioner,

vs.

MARY E. DONNELLY HENAGAN.

ORDER ALLOWING CERTIORARI—May 2, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U.S.
FILED

Supreme Court of the United States.

OCTOBER TERM, 1959.

No. ~~709~~ 38

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,

v.

MARY L. DONNELLY HENAGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Boston, Massachusetts,
February 11, 1960.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

OCTOBER TERM, 1959.

No.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Petitioner,

v.

MARY L. DONNELLY HENAGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

The New York, New Haven and Hartford Railroad Company, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on November 27, 1959.

Citations to Opinions Below.

The order of the judge of the District Court of Massachusetts (R. 133-134) is unreported and is set forth herein. The opinion of the Court of Appeals (R. 167) is re-

ported in 272 F. (2d) 153, and is printed in Appendix B attached hereto.

Jurisdiction.

The judgment of the Court of Appeals was entered on November 27, 1959 (R. 176). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

Questions Presented.

1. Whether a separate appeal must be taken from an order denying a motion for new trial seasonably filed after judgment, or whether the appeal from the judgment is sufficient to bring before the Court of Appeals the question of law raised by the denial of the motion.

2. Whether the Court of Appeals has correctly interpreted the decisions of this Court in cases arising under the Federal Employers' Liability Act (43 U.S.C. Sec. 51) as establishing (*a*) that the plaintiff no longer has the burden of persuasion in actions for negligence, (*b*) that only the barest possibility of causation is enough to make out a case for the jury, and (*c*) that only the faintest scintilla of evidence to suggest the inference of any causal connection between the engineer's possibly negligent failure to apply the brakes sooner and running down the suicide was enough to take the case to the jury.

Statutes and Rules Involved.

The statutory provisions involved are 45 U.S.C. Sec. 51, and the Rules of Civil Procedure for the United States District Courts are Rules 50(b), 54(a), 58, 59(a), 59(b)

and 73(a). The pertinent provisions of these rules are printed in Appendix A attached hereto.

Statement.

The respondent on October 11, 1954, was employed by the petitioner as a grill-car attendant on a regularly scheduled passenger train *en route* from Boston to New York. As the train approached the station at Providence, Rhode Island, where there was a regularly scheduled stop, the engineer had decreased the speed of the train to between 13 and 15 miles an hour, intending to make the regular station stop (R. 24). After the front of the engine had reached the portion of the track adjacent to the station platform covered by a canopy the engineer saw a woman stepping across the rail nearest the station platform (R. 28). She was facing a fence on the opposite side when he first saw her (R. 32). She then took a step forward and turned and faced the engine and squatted down (R. 34). The engineer estimated the distance between her and the locomotive when he first saw her as between 35 and 40 feet (R. 36). He did not apply the brakes when he first saw her with her foot over the first rail, but as soon as he saw her take a step toward the fence and squat down he realized that she was not going to get off the track, and he immediately applied his brake in emergency in an effort to avoid running over her (R. 33). Several other witnesses, whose testimony was uncontradicted, estimated the distance as between 5 and 40 feet between the woman and the front of the locomotive when she was first seen by them on the track (R. 108; R. 110; R. 113; R. 116).

The emergency application of the brakes brought the train to a stop within a distance of about 80 feet (R. 37), whereas in making the intended station stop it would have

gone several hundred feet (R. 38). The body of the woman who had stepped onto the track in front of the locomotive was found 68 feet from the most forward part of the locomotive. There was testimony that the respondent was thrown against the counter but was not thrown off her feet by the sudden stop of the train (R. 59). She, however, became hysterical and was taken back to Boston on another train (R. 50). None of the physicians or specialists who examined her according to the records felt that she had a physical injury of any consequence. There was no evidence of brain damage (R. 103). The respondent had developed a reaction of guilt in causing the death of the woman, which was called a hysterical conversion reaction by the respondent's medical expert, who also testified that this reaction was based upon a paranoid psychosis that must have existed prior to this reaction (R. 104-105).

At the close of all the evidence the petitioner presented a motion for a directed verdict, which was denied conditionally by the Court (R. 133), and thereafter the jury returned a verdict in favor of respondent on January 7, 1959. Judgment was entered forthwith on the same date. Thereafter petitioner filed a motion for judgment notwithstanding the verdict and, in the alternative, for a new trial (R. 132). These motions were denied after hearing on the 13th day of January, 1959 (R. 133). At the hearing the trial judge made endorsements on the motions and stated the reasons for his denial of the several motions as follows (R. 133-134):

"I am denying both motions. On the Defendant's Motion for Directed Verdict I have endorsed this: 'This motion was presented to the Court before the case went to the jury. The Judge waved aside the motion and said it was "denied" but the denial is not meant to be final but merely meant the Judge refused to act upon it until after the jury returned its verdict. The jury having returned its ver-

dict this Judge would grant the motion were he free so to do. But obedient to what he understands to be the views of a majority of the Supreme Court of the United States and solely in response to such command this Court denies the motion. Wyzanski, J., January 13, 1959.'

"On the Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, I have endorsed this as follows: 'This Motion would be granted by this Court were it free to do so, but this Court construes the opinions and judgment of the Supreme Court of the United States as giving him no option but to deny the motion. Wyzanski, J., January 13, 1959.'

"I wish to be a little more explicit than I am in these endorsements. In my opinion there was no evidence whatsoever of negligence on the part of the engineer. I cannot read the record as a whole in a way to find any evidence of negligence. But I know that my method of reading the record is different from that of a majority of the Supreme Court of the United States as exhibited in past cases, and I hope I am a lawful judge, and I recognize the limits of my authority, whether appellate judges do or not.

"With respect to the aspect of causation I also believe that the plaintiff failed to bear the burden of proof. I do not believe that the condition which the plaintiff had even on the plaintiff's medical testimony can legitimately be said to have resulted in whole or in part from the incident which occurred at the Providence Station on the 11th of October, 1954. In my opinion every medical practitioner of any competence would say that the kind of condition which the plaintiff now has owes its origin to factors far antecedent to the 11th of October. It may be that what happened on the 11th of October acted as a trigger, but in my view not as a legal cause. It seems to me to be as irrelevant from the point of view of causation as if on that day the rain suddenly started to dash against the windows and

the plaintiff became frightened. There is no sensible medical explanation which I have ever heard that makes the onset of insanity or mental incompetence legally the result of a situation such as existed in the Providence Station, and I regard the jury as having reached a preposterous conclusion."

Petitioner filed notice of appeal from the judgment on February 11, 1959. The Court of Appeals in its opinion (272 F. (2d) 153, 156) noted that petitioner did not appeal from the denial of its motions for judgment notwithstanding the verdict and for a new trial. The Court thereupon treated the appeal from the judgment as raising only the question of sufficiency of the evidence raised by the petitioner's motion for a directed verdict. The Court, after holding that its interpretation of recent opinions of this Court required submitting the case to the jury, ended its opinion as follows:

"The question whether the court below might properly have granted the defendant a new trial in the hope that another jury might return a verdict more in keeping with the great weight of the evidence is not before us, for the defendant did not appeal from the denial of its motion for a new trial." (R. 175.)

Reasons for Granting the Writ.

1. The refusal of the Court of Appeals to consider the question raised by the denial of defendant's motion for a new trial raises an important question of procedure in taking appeals on questions raised by action of a trial judge on motions for judgment notwithstanding verdict, and on motions for a new trial, seasonably filed as provided by Rule 59(b). The petitioner submits that the ruling of the Court of Appeals to the effect that in addition to an appeal

from the judgment an appeal must also be taken from the denial of the motion for new trial is in conflict with the rulings of this Court and the rulings of the Courts of Appeals in other circuits. It is also contrary to the apparent purpose and spirit of the Federal Rules of Civil Procedure (see Barron & Holtzoff, Federal Practice and Procedure, Rules Ed. § 1551). It is even in conflict with prior opinions in the First Circuit.

The motion for a new trial in the case at bar attacked the verdict on which the judgment was based. The trial judge denied it, not as an exercise of discretion, but on the express ground "that this Court construes the opinion and judgment of the Supreme Court of the United States as giving him no option but to deny the motion" (R. 133). This amounted to a ruling of law that the trial judge lacked the power to allow the motion in the exercise of his discretion. The issue, therefore, before the Court of Appeals was not one of abuse of discretion, but rather the power of the trial judge to exercise his discretion to set aside the verdict and grant a new trial.

The Court of Appeals, however, took the position that the question relating to the denial for a new trial was not before them, "for the defendant did not appeal from the denial of its motion for a new trial" (R. 175). The jury returned a verdict on January 7, 1959. Judgment was entered forthwith in accordance with Rule 58. The motion for new trial was filed January 12 and was denied January 13. The defendant thereafter seasonably appealed from the judgment. Was it also necessary for it to file a second appeal from the order on the motion to carry the question of law raised by the order to the Court of Appeals? The ruling of the Court of Appeals appears to indicate that a separate appeal from such an order is now required in the First Circuit.